IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 06.09.2007
CORAM:
THE HONOURABLE MR. JUSTICE S.MANIKUMAR
W.P.No.26280 of 2007
M.P.No.1 of 2007

M/s.Aditya Envirotech Private Limited ... Petitioner

Vs.

The Commercial Tax Officer,
Guindy Asst. Circle, Chennai. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the impugned records of the respondent in TNGST/0902571/2004-05, quash the impugned order dated 16.10.2006 and further direct the respondent to grant concessional rate of tax at 3% on the turnover of Rs.19,57,784/- covered by Form XVII declarations in view of the settled principles of law as laid down by the First Bench of the Madras High Court in the case of M/s.Sree Murugan Engineering Products reported in 148 STC 419 and in the case of Maruthi Handling Equipments reported in (2007) 7 VST 261 and also to grant an opportunity in respect of the disputed turnover of Rs.7,84,600/- in view of the circular dated 20.04.2001 in Acts Cell-V/13234/2001 issued by the Special Commissioner of Commercial Taxes.

For Petitioner : Mr.P.Rajkumar
For Respondent : Mr.R.Mahadevan,
Additional Government Pleader (Taxes)

O R D E R
The petitioner has sought a Writ of Certiorarified Mandamus, to quash the impugned records of the respondent in TNGST/0902571/2004-05 dated 16.10.2006 and direct the respondent to grant concessional rate of tax at 3% on the turnover of Rs.19,57,784/- covered by Form XVII declarations in view of the settled principles of law as laid down by the First Bench of the Madras High Court in the case of M/s.Sree Murugan Engineering Products reported in 148 STC 419 and in the case of Maruthi Handling Equipments reported in (2007) 7 VST 261 and also to grant an opportunity in respect of the disputed turnover of Rs.7,84,600/- in view of the circular dated 20.04.2001 in Acts Cell-V/13234/2001 issued by the Special Commissioner of Commercial Taxes.

2. The Petitioner is a Fabricator of Air Handling Unit Technology, Chennai and an assesee on the files of the Commercial Tax Officer, Guindy. The Petitioner reported their total and taxable turnover at Rs. 35,39,232/- and Rs.27,45,632 respectively in their monthly returns filed under TNGST, 1959 for the assessment year 2004-2005. The assessing Authority issued a pre assessment notice dated 22.5.2006 and proposed to disallow among other things, Labour charges collection and First Sale of Air Handling Unit against Form XVII. The reasons contained in the pre-assessment notice dated 22.5.2006 for the proposal to disallow are as follows:

"Labour charges Collection Rs.7,84,600-00: They have not produced their work order, labour bills, proof for receipt of material and proof for delivery of finished goods. In the absence of such details, it is proposed to disallow their claim for deduction from turnover, to treat the transaction as sale of air handling unit; and to assess the turnover to tax at Rs.20%.

Sale of air handling unit against Form XVII Rs.19,57,784-00: The dealers have sold air handling unit against form XVII. Air handling unit is a finished product and can be used only as capital goods by the byers. But it is not an item enumerated in the Eighth Schedule, so as to purchase against Form XVII as capital goods. Hence, it is proposed to disallow their claim for concessional rate of tax and to assess this entire turnover of Rs.19,57,784-00 to tax at 20%."

3. The petitioner herein filed their objections through their letter dated 28.07.2006 and the Assessing Officer has considered the same in the impugned order, which is as follows:
"Labour charges: They have produced two labour bills for a value of Rs. 3,41,038.00 and one work order and one delivery challan given by Tvl. Blue Star Ltd. In the two labour bills there is no mention about Tvl. Blue Star's delivery challan and the two labour bills do not tally with the quantity mentioned in the delivery challan. The documents filed related their CST transaction. As they have not produced supporting documents in support of their claim for deduction from turnover, the proposal contained in the notice is confirmed.
Sale Against Form XVII: They have stated that the air handling units were supplied to pharmaceutical industries where the manufacturing take place in sterile clean air only under the supervision of Drug Controller of India; that air handling units become part and parcel of Pharmaceutical machinery and it is not for human comfort, that they are submitted declaration forms for a value of Rs. 18,56,484.00 and thus submitted all declaration forms. According to them, air handling unit provides sterile clean air and it is part and parcel of pharmaceutical machinery. They have themselves admitted that the buyers have not used the air handling units in their manufacturing activity. Goods can be purchased against Form XVII for use in manufacture or for sue as packing materials or as capital goods. The buyers can only buy the capital goods that has been enumerated in the Eight Schedule to the Act. They cannot purchase other capital goods against Form XVII. The air handling units is not either raw materials for the buyers or one of the capital goods mentioned in Eight Schedule to the Act and hence, they cannot buy the same against Form XVII. The goods are therefore liable to tax at 20%. There by the objections were overruled and proposals contained in the pre-assessment notice is confirmed."

4. On receipt of the assessment order dated 16.10.2006, the petitioner by their letter dated 28.11.2006, enclosed further details in the form of the orders and invoices in respect of the Labour charges of Rs.7,84,600/- and in respect of Air Handling Unit, further clarified that the unit by itself cannot be used and the purchases who purchased the same, instals the unit in its factory as an integral part of its machinery for manufacture of drugs and medicines and so requested that the respondent to revise the assessment order. The petitioner further submitted that as there was no response from the respondent, by letter dated 31.07.2007, reiterated the request made earlier and once again requested the respondent to revise the assessment by enclosing the drawings to show that Air Handling Unit was an integral part of the machineries of the purchasers and also enclosed a certificate issued by the purchaser to that effect.
5. Though the petitioner filed applications before the respondent to revise the order, the respondent failed to consider the same and issued the recovery notice dated 19.06.2007. On receipt of the same, the petitioner sent a letter dated 03.07.2007 to the respondent to consider Form XVII declaration and the undertaking given by the purchaser, viz., M/s.Mediclone Biotech Private Limited that they are entitled to purchase the Air Handling Unit against Form XVII declarations. Inspite of the same, the respondent issued a notice dated 03.07.2007 on 05.07.2007, stating that the request for reconsidering Form XVII may be put forth before the Appellate Assistant Commissioner (CT), Kancheepuram, as no revision lies under Section 55 of the Act. Aggrieved by the assessment order on the question of disallowing the exemption for sales effected against Form XVII and the labour charges, the petitioner has preferred this present Writ Petition.
6. Learned Counsel for the petitioner submitted that the issue relating to assessment of tax in terms of section 3(3) of the TNGST Act, has been considered by this Court in a decision in Sree Murugan

Engg. Products v. C.T.O., reported in 148 STC 419. Referring to a circular of the Special Commissioner and Commissioner of Commercial Taxes, Chennai, dated 20.04.2001, learned counsel for the petitioner submitted that the Assessing Officer proceeds to take a different stand in the assessment order from the stand already taken in the notice, a fresh notice is required to be given to the assessee. Therefore, he submitted that in the absence of the same, the impugned order is liable to be set aside.

7. Placing reliance on the decisions of this Court and the Supreme Court, learned counsel for the petitioner submitted that it is not the duty of the seller to enquire into the goods purchased under that Form 'C' will be used in accordance with the certificate of registration or it is not the duty to enquire for the purpose for which, the goods purchase will be put to use.

8. As regards the contention of the labour bills produced by the petitioner for a value of Rs.3,41,038/- and delivery challan to give by M/s.Blue Star Ltd., relates to the above charges collected by the petitioner and the transactions is nothing but pure labour work without involving any transfer of materials from the petitioner to its customers, learned counsel for the petitioner submitted that liberty may be given to the petitioner to challenge the order of assessing officer in absolving the labour charges and that the competent authority may be directed to provide adequate opportunity to the dealer to put forth his case. His submission is placed on record.

9. Section 3(3) and 3(5) of the TNGST Act reads as follows:

"Notwithstanding anything contained in sub-section (2) but subject to the provisions of sub-section (1), the tax payable by dealer in respect of sale of any of the goods mentioned in the Eight Schedule to any other dealer for installation of and us in, his factory site situate within the State for the manufacture of any goods shall be at the rate of three percent on the turnover relating to such sale. Provided that the provisions of this sub-section shall not apply to any sale, unless the dealer selling such goods furnished to the assessing authority in the prescribed manner and within the prescribed period, a declaration duly filed in and signed by the dealer to whom the goods are sold, containing the prescribed particulars in the prescribed form obtained from the prescribed authority. Provided further that any such dealers, who after purchasing the goods in respect of which he had furnished any declaration, fails to install the goods and make use of the goods so purchased for the purpose specified in the declaration or disposes of such goods in any other manner within a period of five years shall pay the difference of tax payable on the turnover relating to sale of such goods at the rate prescribed and three percent."

10. The serial no.3 of the Eight Schedule of the TNGST ACT 1959 is as follows:
"Machineries of all kinds (other than those specifically mentioned in the First Schedule) worked by (i) Electricity (ii) Nuclear Power (iii) Hydro-dynamic and steam power (iv) Diesel or Petrol (vi) Furnace oil (vii) Kerosene (viii) Coal including coke and charcoal or (ix) any other form of fuel or power (excluding human or animal labour) (x) parts and accessories of machineries and tools used with the machineries mentioned in sub-item (i) to (viii) above. However Textile machinery is specifically mentioned in the First Schedule under Part B Sl. No. 63 to be taxable at 4% from 17.7.1996."

11. Though several decisions have been relied on by the learned counsel for the petitioner, it is not necessary to deal with all the cases and it is suffice to consider the Division Bench judgments of this Court and examine whether the same are applicable to the facts of the case.

12. In Premier Electro Mechanical Fabricators, Vs. The State of Madras reported in 22 STC 269, this Court held as follows:

"What section 3(3) enacts is that, notwithstanding what is contained in sub-section (2) a dealer is entitled to the concessional rate as a matter of right, provided he satisfies the requisites of that sub-section. The requisites are three-fold (1) the goods, which are the subject matter of sale should be those mentioned in the First Schedule, (2) the sale must be to another dealers and (3) the goods sold should be for the use by the purchaser as component parts of any other goods mentioned in the First Schedule, which he intends to manufacture inside the State of sale. If these requisites are satisfied, the lower rate of tax under sub-section (3) will apply. So far as the first requisite is concerned, the assessing officer himself has treated the goods sold as within the First Schedule. It was only on that basis he charged three percent. There is no dispute about the second requisite being satisfied; for the purchaser is undoubtedly a dealer. The misapprehension of the department is particularly in respect of the third requisite. The assesee satisfies the requisite, if he complies with the proviso, and he is not called upon, beyond production of a declaration in Form XVII, to show that the declaration has been given effect to. It is true that, in order to satisfy the third requisite, the goods sold should be for use by a purchasing dealer as components parts of some other goods to be manufactured. But the manner in which the seller has to satisfy the requisite is as provide in the proviso to the sub-section; namely, production of the declaration in the prescribed form. Once that is done, there is no further obligation on the part of the selling dealer and he will automatically be entitled to the concessional rate. If the declaration turns out to be false, in the sense that the goods purchased have not been used as declared in the prescribed from, the purchaser is exposed to the penalties provided by section 23 and section 45(2) (e). If the purchase will make a false declaration or a declaration which he does not comply with, he would do so under peril of meeting those penalties. But on that account, the selling dealer is not deprived of the concessional rate. The physical changes which the Board mentioned do not appear to us to bring about any substantial change to the fact that the goods sold will fall within the First Schedule and are to be used as component parts by the Purchasing dealer in the manufacture of some other goods falling within that Schedule."

13. The First Bench of this Court in Sree Murugan Engineering Products Vs. Commercial Tax Officer, Coimbatore, reported in 148 STC 419, in Paragraph 15, held as follows:
"the issue involved is covered by several Judgments of the High Court and the Supreme Court, and it has been consistently held that for the contravention of condition for Form XVII, tax and penalty could be imposed only against the purchasing dealers and not against the seller, as per section 3(3) of the Act."

14. Recently, the First Bench of this Court in W.A.No.551 of 2007, dated 06.06.2007, again reaffirmed the legal position on this point and held that the tax and penalty can be imposed only against the purchasing dealer and not against the seller, as per Section 3(3) of the TNGST Act and accordingly, quashed the impugned order passed by the Assessing Authority, as without jurisdiction.

15. On consideration of the facts of this case and in the light of the judgments referred to above, I am of the opinion, that the issue is covered by decisions of this Court and the Supreme Court and it has been consistently held that the seller who receives a declaration in Form XVII issued under section 3(3) of the Act, is continued to making sure that the declaration has been duly filled in and signed by the purchaser/dealer and that the Forms given to the seller is the one prescribed and obtained from the prescribed authority. The seller is under no further obligation to enquire into whether the buyer is engaged in the process of manufacture and if so, whether the goods purchased from the seller are put to use as the component part or the product manufactured by the buyer, or a machinery mentioned in the Eight Schedule is utilized by the Purchaser for more than 5 years as contemplated under section 3(5) of the TNGST Act.

16. The impugned revised order passed by the assessing authority is clearly against the provisions of

the Act and without Jurisdiction. Therefore, on consideration of the pleadings of the materials on record, I am of the opinion that the matter has to be remitted to the Assessing Authority on the limited aspect, to determine the turnover covered by valid Form XVII, for the reason that total sales have been shown as Rs. 19,57,784/-, in the impugned order, it is stated that Form XVII has been filed only for the turnover of Rs.18,56,488/- and at the same time, it is mentioned as if that the dealer had submitted declaration forms for the entire sales turnover of 19,57,784/-. To make it clear, the turnover against Form XVII produced for Rs.18,56,488/- is excluded.

17. On the second issue raised by the petitioner on the disallowance of Labour charges collection, since no opportunity was given to the Petitioner as per the clarification of the Commissioner of Commercial Taxes, in Acts Cell VI/13234/2001 dated 20.4.2001, without going into the merits of the case, liberty is given to the petitioner to file an appeal before the appellate authority, within three weeks from the date of receipt of a copy of this order. On receipt of the appeal, the appellate authority shall entertain the appeal without insisting upon the period of limitation.

18. Writ Petition is allowed only to the extent of sales against Form XVII submitted by the petitioner on the turnover covered by Form XVII at the concessional rate of 3%. This order shall not preclude the Assessing Officer to proceed against the purchaser with the provisions of law. No costs. Consequently, connected Miscellaneous Petition is also closed.

06.09.2007
NOTE TO OFFICE:
Registry is directed to return the Original
impugned order dated 16.10.2006 and
issue the order copy on 21.09.2007
skm
To
The Commercial Tax Officer,
Guindy Asst. Circle, Chennai.

S. MANIKUMAR, J.
skm

W.P.No.26280 of 2007

06.09.2007